No. 09-1488

In The

Supreme Court of the United States

SALLY CORNEJO, individually and on behalf of her minor son Kevin Salas,

Petitioner,

v.

FREDDA MONN, JODI KAPLAN, and DAWN SCHWARTZ,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF

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I. THE INSTANT PETITION PRESENTS AN IMPORTANT QUESTION AS TO THE SCOPE OF ABSOLUTE IMMUNITY

A. Respondents Concede the Absence of Historical Analysis

Respondents concede that government attorneys who handle civil child welfare cases did not exist in 1871. (Opp.[1] 11-12) Thus, respondents impliedly accept that Congress could not have intended to preserve immunity for a segment of the profession which did not exist yet. Respondents recognize that under such circumstances, this Court has required "a considered inquiry into the immunity historically accorded to the relevant official at common law. . . ." (Opp. 11)

Respondents concede that the Second Circuit did not, in this case, consider the history of immunity afforded to municipal civil attorneys, such as respondents, in reaching its conclusion that they are entitled to absolute immunity under 42 U.S.C. §1983. Respondents do not challenge the historical analysis proposed by petitioners (Petition 9-14). Instead, respondents argue that the historical analysis is not essential because "precedent supports application of absolute immunity to ACS attorneys" (Opp. 10-14), based on policy considerations (Opp. 11). However, contrary to this Court's jurisprudence, respondents here, and the court below, have not undertaken the

[1] "Opp." refers to the Brief in Opposition to Certiorari.

historical inquiry that this Court requires as the initial step in an absolute immunity analysis. *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432 (1993); *Malley v. Briggs*, 475 U.S. 335, 339-40 (1986); Petition 9-14.

In arguing that the historical analysis may be dispensed with, and in arguing the merits of their claim for an extension of absolute immunity to municipal attorneys representing clients in civil proceedings, respondents highlight the importance of the question presented to this Court regarding the scope of absolute immunity.

B. Respondents' Functional Arguments

In support of their assertion of absolute immunity, respondents rely on a 32-year-old decision of this Court which afforded absolute immunity to attorneys who, following their clients' instructions, represented a federal agency in a proceeding to enforce federal regulations, *Butz v. Economou*, 438 U.S. 478 (1978). This Court's ruling in *Butz* concerned attorneys who represent federal officials in proceedings to enforce federal regulations. The issue of whether absolute immunity should be extended to attorneys representing local governmental clients in civil matters, and who contravene their clients' instructions, is one which *Butz* did not address. Respondents also cite to *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), which held that "executive officials in general, ... qualified immunity represents the norm." *Id.* at 807. *Harlow* is

inapposite to the issues presented here, since the court below did not discuss questions of qualified immunity, and petitioners do not raise those questions here.

Whether the holding of *Butz* should be extended to municipal civil attorneys is an issue that respondents clearly deem important, since they rely not only upon *Butz* but also upon *Walden v. Wishengrad*, 745 F.2d 149 (2d Cir. 1984). In *Walden*, the Second Circuit, citing *Butz*, afforded absolute immunity to a county child welfare attorney who had secured an arrest warrant for a witness who failed to comply with a subpoena in a state child welfare case. In *Walden*, the Second Circuit also did not conduct the historical analysis of the immunity afforded to county child welfare attorneys, particularly those who act in contravention of their client's instructions.

Respondents argue strenuously that they were performing prosecutorial functions in the representation of their client in the Family Court and, therefore, should be entitled to absolute immunity. (Opp. 14-15) Petitioners disagree; among other things, proceedings in the Family Court are civil in nature. (Petition 19-22) But, the fact that respondents argue the merits of their claim for an extension of absolute immunity to civil attorneys – whom they deem to be analogous to criminal prosecutors – underscores the importance of the issue proposed for review. This Court has not afforded blanket absolute immunity even to criminal prosecutors, but has used functional

analyses to evaluate those claims. *See*, *Kalina v. Fletcher*, 522 U.S. 118 (1998) (prosecutor gave sworn testimony in a warrant application); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) (prosecutor fabricated evidence and held a press conference); *Burns v. Reed*, 500 U.S. 478 (1991) (prosecutor gave legal advice to police during an investigation); *see also*, Petition 22-26.

In claiming that they functioned as prosecutors, respondents specifically point to their attempts to obtain a second and third medical opinion, from doctors in other states, after the New York City Medical Examiner concluded that Ms. Cornejo's baby had died from natural causes and not child abuse. (Opp. 4) Petitioners submit that the search for evidence is a classic investigatory function, not a prosecutorial function. *See*, *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993) ("There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration . . . on the other hand.") Using the functional analysis that this Court has employed, respondents have presented an important question as to whether their actions fall within the bounds of a prosecutorial function. This Court should decide that question.

Finally, respondents' claim that "[t]he decision whether to pursue or withdraw a Family Court petition is manifestly the function of an advocate" (Opp. 15) likewise demonstrates the importance of

the issue. Petitioners absolutely disagree with that statement, and submit that the decision to pursue or settle a civil case belongs solely to the client, not the advocate. (*See* Petition 24-25) That decision is in no way a "core advocacy function." (Opp. 18) This Court should decide the legal issue of whether a municipal attorney who contravenes her client's instructions is nonetheless protected by the same absolute immunity which protects criminal prosecutors when they engage in prosecutorial functions.

C. Respondents' Public Policy Arguments

Respondents' proffered arguments in favor of absolute immunity for civil government attorneys are grounded not in law, but in pure public policy. (*See* Opp. 13-14) This Court has repeatedly rejected such public policy arguments as a basis for expanding immunity: "our role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice [regarding questions of immunity], and . . . we are guided in interpreting Congress' intent by the common-law tradition." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). This Court "do[es] not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy. It is for Congress to determine whether § 1983 litigation has become too burdensome to state or federal institutions and, if so, what remedial action is appropriate." *Tower v. Glover*, 467 U.S. 914, 922-23 (1984).

The policy arguments made here, however, show that the issue raised by the instant case is an important question of federal law. Respondents urge that the state's "urgent interest in the welfare of the child" (Opp. 13) and "the importance of child protection activities" (Opp. 7) purportedly justify affording absolute immunity to all actions of municipal child welfare lawyers. (Opp. 7, 14). Although petitioners do not agree that government attorneys who countermand the instructions of their clients, the child welfare professionals, are acting in the interests of children, petitioners agree that child welfare and child protection raise important federal questions, which merit review by this Court. Nationwide, approximately 269,000 children were removed from their homes as a result of a child maltreatment investigation in 2008.[2] Each of those involuntary removals required some kind of court proceeding, 42 U.S.C. §672(a)(2)(ii) and, hence, the participation of attorneys.

Respondents also claim entitlement to absolute immunity so that they can "perform [their] duties free from fear of potential lawsuits by individuals allegedly harmed by her actions." (Opp. 13) However, those duties do not include disobeying their own clients' instructions.

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[2] http://www.acf.hhs.gov/programs/cb/pubs/cm08/chapter6.htm (last visited July 16, 2010).

II. THE INSTANT PETITION PRESENTS A QUESTION OF LAW, NOT OF FACT

A. The Disputed Factual Allegations Do Not Control the Pure Legal Question

The issue presented by the instant case is straightforward: does a municipal attorney who contravenes her client's instructions to settle a civil case have absolute immunity in a subsequent civil rights action? Despite the purely legal nature of the issue proposed by the petition, respondents devote the majority of their opposition to certiorari to a discussion of disputed facts. (Opp. 1-10).

Given the purely legal nature of the issue, the reliance on the factual assertions is both unusual and distracting. "Because the only question presented by the certiorari petition relates to the absolute immunity defense on which the Court of Appeals based its decision, . . . [this Court has] no occasion to comment on the validity of petitioner's underlying cause of action." *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 431 n. 2 (1993). The Court of Appeals did not comment on the validity of the underlying cause of action here, recognizing that the issue of absolute immunity trumps the merits of the case. (App. 8-9) The District Court did comment, but in petitioners' favor, noting that "these facts could give rise to a question of fact as to whether probable cause continued to exist in support of the petition against Cornejo as early as November 14, at the end of the first two weeks of the investigation." (App. 49) In other words, both the Court of Appeals and the

District Court recognized, as respondents do not, that the disputed factual allegations do not determine the pure legal issue.

B. The Facts Must Be Construed in the Light Most Favorable to Petitioners

While respondents complain about Ms. Cornejo's "particular interpretation of the facts," (Opp. 7), they forget that the law requires that interpretation. The instant case comes to this Court on a motion for summary judgment, where the courts must "recite the facts . . . in the light most favorable to" Ms. Cornejo. *Pennsylvania State Police v. Suders*, 542 U.S. 129, 134 (2004). Even when the facts themselves are not in dispute, "'the inferences to be drawn from the underlying facts contained in [the affidavits, attached exhibits, and depositions submitted below] must be viewed in the light most favorable to the party opposing the motion.'" *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 862-63 (1982), quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). In sum, "the issue . . . in this case is a narrow one, both substantively and procedurally. . . ." *Board of Educ., supra.*

Respondents, in their own lengthy version of the facts, have ignored the rules governing motions for summary judgment. Contrary to law, they have resolved all disputed facts in their own favor, and have drawn all inferences from those facts in their favor and against Ms. Cornejo.

In attempting to evade responsibility for their actions and omissions, respondents first blame their clients, the social workers, implying that the social workers did not instruct respondents to withdraw the case against Ms. Cornejo. That innuendo is directly contrary to the finding of the District Court, that social worker Joyce "De Nicholson instructed the . . . attorneys to withdraw the petition against Cornejo. . . ." (App. 28) Seeking to discredit their own client, respondents claim that Ms. "De Nicholson . . . could not recall when she spoke to an attorney during that period, to whom she spoke, or what she said (A-377-379[3])." (Opp. 8) That statement is simply wrong; Ms. De Nicholson told her attorney "that there was no way that this lady was at home when this baby got sick, and that the baby should go back to mom and withdraw the petition against her." (A-379) The conversation occurred "two to three weeks after the case first started." (A-378) And the attorney with whom Ms. De Nicholson spoke, whose name she had forgotten, was "the one who was going to court on the Cornejo case." (A-379)

Moreover, on February 6, 2003, nearly two months after having directed respondents to return Kevin and withdraw the case against Ms. Cornejo, the social workers completed their investigation of the allegations of child abuse. *See*, N.Y. Soc. Serv. L.

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[3] References labeled "A" are to the Joint Appendix which was filed in the Second Circuit.

§§424(6)(a), 424(7). The social workers determined that the charges of child abuse were unfounded (A-212), *i.e.*, not supported by any evidence whatsoever against either parent. N.Y. Soc. Serv. L. §412(6). Respondents nevertheless continued the case against Ms. Cornejo in the New York Family Court, contrary to their clients' instructions.

On February 10, 2003, Ms. De Nicholson confirmed, by email, that the social workers wanted the petition to be withdrawn but "Legal [*i.e.* respondents] . . . will [sic] like another medical opinion as they disagree with the M[edical] E[xaminer]'s findings. . . ." (A-168 ¶156)

Second, the respondents claim, or hint, that they did not countermand their clients' instructions: "the ACS attorneys promptly sought to have Kevin returned to Cornejo's custody as soon as they verified that she was not at home when Kenny was allegedly shaken, and that the condition of Kenny's rib was not a fracture resulting from child abuse." (Opp. 8-9, Opp. 14) However, the social workers' instructions were not merely to return Kevin to Ms. Cornejo's custody, but also to withdraw the case against her. The respondents contravened their clients' instructions to withdraw the case. Moreover, the attorneys did not seek an unfettered restoration of Ms. Cornejo's custodial rights; they grudgingly asked the judge only to "parole" Kevin to Ms. Cornejo. "A paroled child returns to live with the parent, but subject to broad supervision by ACS. For instance, ACS may demand the right to make unannounced home visits, or that

the parents participate in counseling, relocation, or other services." *Nicholson v. Scoppetta*, 344 F.3d 154, 160 (2d Cir. 2003).

Respondents' half-hearted attempt to reunite Kevin with Ms. Cornejo was doomed to failure. As the judge noted, if Ms. Cornejo "had nothing to do with" the injuries to her baby, "[w]hy should she be subject to any orders restricting her access to the child [Kevin]?" (App. 70). The answer was that respondents "want[ ] to have it both ways" (App. 69; *see also*, A-165 ¶146), contrary to their clients' instructions.

Next, the respondents blame the Family Court judge: "[t]he Family Court, rather than the ACS attorneys, prolonged Kevin's separation from Cornejo." (Opp. 9) That blame is likewise misplaced. As the judge noted, respondents' self-contradictory request to reunite Kevin with his mother while continuing to charge her with the fatal abuse of his baby brother was "duplicitous." (App. 71) The judge recognized that respondents were attempting to foist responsibility onto the court, making the judge decide an issue that should have been respondents' decision, and to do so based "on less than sufficient information." (App. 71)

Respondents also seek to hold the judge (and not themselves) responsible for failing to grant respondents' purported "repeated motions" to withdraw the case against Ms. Cornejo. (Opp. 9) Petitioners categorically deny that respondents made "repeated" motions. Respondents made at most two motions to withdraw the case, but ensured that the motions

would fail, by adding a condition that their clients had not sought and that the court was unable to grant – the condition that Ms. Cornejo be "supervised" by the social workers. (App. 29) As the Family Court judge recognized (App. 29), when a petition is dismissed, the New York "Family Court loses jurisdiction and thereafter further conditions may not be imposed." *Matter of Rasha B.*, 139 A.D.2d 962, 963, 527 N.Y.S.2d 933, 934 (4th Dept. 1988). "There is no provision in the Family Court Act for a conditional dismissal of a child neglect petition." *Matter of Dina V.*, 86 A.D.2d 875, 875-76, 447 N.Y.S.2d 296, 297 (2d Dept. 1982).

Petitioners categorically deny the assertion that respondent "asked that Kevin be 'paroled' to Cornejo under ACS's supervision [in order] to ensure that Kevin remained in New York City, and away from Salas, while the proceedings were pending." (Opp. 9) Respondents have not previously given that reason for their request for parole – contrary to their clients' instructions – and petitioners have been unable to find any support for it in the record. Moreover, since Salas had been deported (A-154 ¶82), there was no need for ACS supervision to keep Kevin away from Salas. Nor is there any reason – stated or unstated – to keep Kevin in New York City.

Petitioners likewise deny that respondents "sought to mediate the medical dispute." (Opp. 9-10) Respondents' clients did not think there was a material medical dispute when they directed their

attorneys, respondents herein, to withdraw the case against Ms. Cornejo and return Kevin to her custody. Indeed, the supposed dispute concerned Ms. Cornejo's fiancé (Kevin's father) only and was thus irrelevant to Ms. Cornejo and Kevin. "The government may not, consistent with the Constitution, interpose itself between a fit parent and her children simply because of the conduct – real or imagined – of the other parent." *Wallis v. Spencer*, 202 F.3d 1126, 1142 n. 14 (9th Cir. 2003). In fact, the record does not reflect any attempts to "mediate" a dispute. To the extent that respondents consider seeking a second, and then a third, medical opinion from out-of-state physicians to be a form of mediation, petitioners submit that that type of "mediation" is part of the investigatory function, not the advocacy function. *See*, *Buckley, supra*, at 274-75. Even if respondents, as attorneys with clients, were entitled to make a "judgment call" as a matter of law, respondents' claim that their "judgment call is understandable (Opp. 10), although it contravened their clients' instructions, raises a factual issue which should be determined by a jury.

CONCLUSION

For all the aforementioned reasons, petitioners respectfully pray that the writ of certiorari be granted.

Dated: New York, New York
July 19, 2010

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